United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1544

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

THE UNITED STATES OF AMERICA
Appellee-Plaintiff

-vs-

LEONARD JOHNSON , and
LEROY MC CLAMB,
Appellant-Defendants

BRIEF + APPENDIX FOR APPELLANTS LEONARD JOHNSON LEROY MC CLAMB

On Appeal from the United States District Court for the Western District of New York

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PRELIMINARY STATEMENT

Appellant LEROY MC CLAMB appeals from a jury verdict entered the 30th day of September, 1976 and sentence of Hon. John T. Elfvin, United States Districe Court Judge for the Western District of New York, entered November 1, 1976, convicting him of a single count indictment charging a violation of Title 18 U.S.C. Sections 1708 and 2. Appellant MC CLAMB was sentenced to the custody of the Attorney General for a period of three (3) years, but execution of the last 2-1/2 years of sentence was suspended and the period of incarceration reduced to 6 months. The appellant was placed on probation for a period of 2-1/2 years.

Appellant LEONARD JOHNSON appeals from a jury verdict entered the 30th day of September, 1976 and the sentence of Hon. John T. Elfvin, United States District Court Judge for the Western District of New York, entered on or about November 2, 1976, convicting him of a single count indictment a violation of Title 18 U.S.C. Sections 1708 and 2. Appellant JOHNSON was sentenced to the custody of the Attorney General for a period of five (5) years, with execution of the last 4-1/2 years of the sentence suspended. The appellant was placed on probation for 4-1/2 years and sentenced to be incarcerated for 6 months.

QUESTIONS PRESENTED

1) Did the Government fail to establish its proof that the purported checks had been in the mail or were stolen from the mail?

2) Whether the Government's failure to prove a necessary element of the offense charged bars retrial of appellants in view of their double jeopardy rights.

3) Whether testimony of undercover agent Pochopin in regard to Appellant Johnson's statement as to future conduct was improperly admitted into evidence.

4) Whether the trial court erred in failing to immediate caution the jury that Johnson's statement could be used against Johnson only.

5) Whether the trial court erred in ruling that Appellant Mc Clamb's two prior convictions could be used to impeach him if he were to testify.

STATEMENT OF FACTS

The appellant, LEROY MC CLAMB, was indicted on the 22nd day of October, 1975, with the appellant, LEONARD JOHNSON, in a single count indictment which charged violations of Title 18 U.S.C. Section 1708 and 2. Prior to trial, a hearing was held before the Hon. John T. Elfvin, United States District Judge on the 2nd day of February, 1976, to determine whether either or both of the two prior criminal convictions could be used to impeach the appellant, LEROY MC CLAMB, should he take the stand. The Hon. John T. Elfvin ruled that both appellant LEROY MC CLAMB's prior convictions could be used against him for impeachment purposes.

The indictment charged that on or about the 7th day of October, 1975 in the Western District of New York, the appellants LEONARD JOHNSON and LEROY MC CLAMB, unlawfully had in their possession twenty-one United States Treasure Checks, all of which were dated October 1, 1975; which checks had been stolen from the mail well-knowing the said checks had been stolen.

Trial commenced on September 28, 1976 at Buffalo, New York before the Hon. John T. Elfvin. The Government's first witness was the letter carrier for the United States Post Office, Mr. Floyd Thomas, who testified that on October 1st of 1975, he sorted the mail for his route, bundled it and prepared it for the relay trucks to take to his relay boxes (all subsequent page numbers refer to the trial transcript--p.9). After Mr. Thomas delivered his first bundle of mail, he went to his relay box on Northland and Masten Avenues and found the box opened

and the lock damaged and the mail gone. (p.11,12) Mr. Thomas immediately went to a phone and notified the Post Office Department (p.15). Mr. Thomas testified that he did not observe the appellant, LEROY MC CLAMB, at the relay box (p.17) and that he did not observe anyone breaking into it (p.23).

Mr. Thomas initially testified that he could recall that mail addressed to the Purdy Street addresses was in the mail when he sorted the mail on October 1, 1975. On cross-examination, Mr. Thomas testified that the usual practice was for Purdy Street residents to receive checks on the first of each month and that he knew that a certain individual payee's check was in the mail because she usually got a check (p.26,27). Mr. Thomas further testified that he did not know if the sack of mail he prepared to go on a relay truck to his relay box arrived intact at the box (p.30).

The Government's second witness was special agent Robert Pochopin with the United States Secret Service, who testified that as a result of a phone conversation with a government informant, James Vincent Carbone, he arranged to purchase United States Treasury Checks (p.37). The place was Gleason's Restaurant at approximately 10 A.M. on October 7, 1975. The meeting was arranged by Mr. Carbone who was present during part of the negotiations. Mr. Pochopin identified the appellants, LEROY MC CLAMB and LEONARD JOHNSON, as the other individuals involved in this transaction (p.47). During Mr. Pochopin's testimony, the government made an offer of proof of a conversation between Mr. Pochopin and MR. JOHNSON in which MR. JOHNSON

offered that the reason the price of the checks was so high was because there was a small amount involved, whereas, if Mr. Pochopin were interested, MR. JOHNSON could get more (p.57). After hearing appellants' counsel (p.57-66), the Court determined that the statement was admissable on the question of state of mind and intention of the defendants (p.66).

POINT I

THE APPELLANTS' CONVICTION SHOULD BE REVERSED BECAUSE THE GOVERNMENT FAILED TO ESTABLISH ITS PROOF THAT THE PURPORTED CHECKS HAD BEEN IN THE MAIL OR WERE STOLEN FROM THE MAIL.

In the instant case, the prosecution did not present any evidence, testimonial or otherwise, that these items were placed in a United States mail depository by a proper governmental employee, who, in that person's ordinary course of business, was the person responsible for mailing such items. Additionally, no original envelopes were presented which would have gone to the burden of proof to establish that same had been mailed. The only evidence offered by the government as to these items having been in the mail was the testimony of the postman, Mr. Thomas who only could indicate that checks normally came for Purdy Street residents on the 1st or 3rd of the month (transcript p.25, 26,27). Mr. Thomas further indicated that there had been some 700-800 pieces of mail on October 1st and he could not specifically identify those items as being there (trial transcript ibid). Additionally, Mr. Thomas sorted the mail on October 1st, 1975, at the substation and he could not state with certainty that such mail ever reached the relay box (trial transcript p.29). Finally, the government presented no specific evidence that the items in question has been stolen from the mail, only that some mail for Purdy Street appeared to be missing.

In a prosecution for theft from the mail where eye witness testimony is lacking, the government usually produces evidence that the sender placed in the mails the item alleged to have been stolen, along with evidence from the addressee that the

item was never received. From this the jury can infer that an item which is found in improper hands was stolen from the mails. United States vs. Robinson , November 10, 1976, U.S.C. of A. 2d Circuit. In the Robinson case, supra, the government produced no evidence from the sender but limited its proof to evidence that the checks were always received by the addressees by mail, that they were issued by three disbursement offices outside New York, that they did not arrive, that they were endorsed by someone other than the payee and they were deposited in banks where the payees had no accounts. The Second Circuit held that this was insufficient proof that the checks were stolen from the mail, and that the government's proof amounted to nothing more that proof of non-receipt. Robinson, supra at 450

> All that was required was evidence demonstrating that the checks were duly placed in the mails. CF. United States vs. Toliver, _____ F.2d _____, slip. op. 5321,5334 (2d Circuit Sept. 2, 1976). We hold that proof of non-receipt, without more, is insufficient even circumstantially to sustain an inference that the checks were stolen from the mails. Robinson, supra at 450

In the Robinson case, the Court ruled that because the ground for reversal related not to a trial court error, but rather to a failure in the government's proof, a retrial of appellant on the possession counts would violate his double jeopardy rights.

In the case of United States vs. Hines, 256 F. 2d 561 (2d Circuit 1958), the court set out standards which the government's proof must meet. In that case, which involved a charge of possession of a letter stolen from the mail, the government showed the following facts which the Court held to be sufficient to support the verdict: the check was deposited in

the mails in an envelope properly addressed to the payee; that the payee never received it or authorized anyone else to receive it or cash it; and that the defendant has possession and attempted to cash it, using false identification and a forged endorsement. Chief Judge Clark explained the standards as follows:

> To procure a conviction (under 18 U.S.C. section 1708) the prosecution had to show that the check actually had been stolen from the mails and that the defendant unlawfully possessed it, knowing that it was stolen. ... the evidence adequately supports the conclusion that the check was actually stolen from the mails, for a letter properly mailed and never received by the addressee, but found in quite improper and misusing hands, can be found to have been stolen from the mails in the absence of any other proof being proffered. Hines, supra at 563-64

It is clear that"use of the mails may be established, like most other facts, by circumstantial evidence" United States vs. Fassoulis, 445 F.2d 13,17 (2d Circuit) cert. denied 404 U.S.838, 92 S. Ct. 110, 30 L.Ed. 2d 100 (1971). However, it is impermissable to allow a jury to infer that because checks were issued in different cities, it is unlikely that they all would have been taken from the separate disbursing offices and for more likely that they were stolen from the mail. This is exactly the argument that the Second Circuit rejected in Robinson, supra. Clearly, there must be some evidence, either established by business records or testimony by witnesses as to usual custom and practice, that the items in question were mailed.

In the case of United States vs. Baker, 50 F. 2d 122 (2d Circuit, 1931) which involved a charge of using the mails to defraud, the court noted that the proof of mailing of the defrauding letters was the sina qua non of the crime charged, and therefore scrutinized the proof carefully in regard to mailing.

> If the guilt of an accused under the mail fraud statute required no more proof of the mailing of a letter than proof that it was written in one city and received in another, the task of a federal prosecutor in such a case is much simpler than had hitherto been supposed. United States vs. Baker, supra at 124.

As the Court in Baker rightly pointed out, Federal Jurisdiction is based entirely upon use of the mails, as it is in the case before this court. The Court in Baker noted that since the letter in question went from New York to Hartford, it is very likely that it went by mail, as that is a convenient and customary way to send letters from one city to another, but that this "proof" is insufficient. The Court reversed, holding that it was necessary to insist upon real proof, circumstantial or direct, that beyond a reasonable doubt the mail was used.

In United States vs. Toliver, 541 F. 2d 958 (2d Circuit, 1976) the appellants were convicted of various counts charging conspiracies to use the mails to defraud in violation of 18 U.S.C. Section 371 and others charging substantial mail frauds in violation of 18 U.S.C. Sections 1341, 1342. In that case, the court upheld the appellants' convictions, ruling:

> Here there was adequate circumstantial proof, including testimony of a New York unemployment official that the department's usual practice was to mail the Form LO 12.11, and the unemployment checks which was corroborated by the fact that the forms and checks in this case had moved on their usual rounds from the office to the employer and from Albany to Buffalo. Toliver, supra at 966.

In the case before this Court, the government offered no proof whatsoever, either real or circumstantial that the items in question were stolen from the mail. It would have been a simple and expeditious matter for the government to introduce evidence of mailing of the items in question. This could have been

accomplished in numerous ways without undue inconvenience to the government; for example, by way of the business records of the issuing agencies, by testimony from an employee of the issuing agencies attesting to the business procedure and custom regarding mailing of checks, introduction of envelopes in which the checks were mailed, or by any other testimony or records which indicated that these items were mailed. Clearly the testimony of the postman indicates nothing more that that he normally delivers government checks on the 1st and 3rd of each month to individuals on his route. Since he could not state with certainty that he saw the checks in question in the mail prior to the tampering of the relay box, the government had introduced no evidence that the items in question were stolen from the mail. Here, as in the case of United States vs. Robinson, the government has proved nothing more than non-receipt of the items in question, which is clearly insufficient to convict the appellants of the instant charge.

POINT II

SINCE THE GOVERNMENT FAILED TO PROVE A NECESSARY ELEMENT OF THE OFFENSE CHARGED, RETRIAL OF APPELLANT WOULD VIOLATE THEIR DOUBLE JEOPARDY RIGHTS.

Granting the government the right to retry these appelants would allow the prosecutor to re-examine the weaknesses in his first presentation in order to strengthen the second and it would disserve the appelants legitimate interest in exercising their Fifth Amendment right to be free from having to be twice put in jeopardy for the same offense. When a defendant has been once convicted for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried for the same offense. Ex parte Lange 18 Wall. 163(1874); in Re Nielsen 131 U.S. 176 (1889); United States vs. Wilson 420 U.S. at 342.

> The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense...The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhansing the possibility that even though innocent, he may be found guilty.
>
> Green vs. United States,335 U.S.184,187-188 (1957), cited in Serfass vs. United States,420 U.S. 337, 388 (1975).

Appellants contend that their case is identical in point to that of United States vs. Robinson, November 10, 1976, U.S.C. of A. for the Second Circuit, where the Court held that because the grounds for reversal was not a trial court error, but a failure in the government's proof, the appellant could not be retried.

Therefore, since double jeopardy clear attaches once there has been a jury trial, retrial of the appellants would violate their Fifth Amendments Rights.

POINT III

THE TESTIMONY OF UNDERCOVER AGENT POCHOPIN IN REGARD TO APPELLANT JOHNSON'S STATEMENT AS TO FUTURE CONDUCT WAS IRRELEVANT AND HIGHLY PREJUDICIAL AND WAS IMPROPERLY ADMITTED INTO EVIDENCE.

Admission into evidence of testimony by undercover agent Pochopin that defendant JOHNSON indicated to him that he could get him more checks the next month was entirely irrelevant on the issue of whether defendant JOHNSON knew the checks were stolen (p.67). The Government argues that since the statement indicates defendants' knowledge of the source of the checks, by indicating an ability to get more checks, it helps to establish the required Mens Rea of the offense charged (p.58 and 63). This argument is circular and requires, for its relevance, a presumption of the fact that it is offered to prove.

If the defendants had the checks in their possession, there is an inference that they had a source, meaning that they came into this possession in some manner. If they came into possession of these objects once, they might well be able to repeat the process.

The argument that the ability to repeat this process has any probative value as to the nature of the process itself lacks a logical structure. If the defendant's source gave no notice to them that the checks were in fact stolen the first time they made use of it, then a statement that they would do it again has no relevance to their knowledge that the checks were stolen.

It was improper to admit as evidence of the nature of the source, that it provided such knowledge, a statement which does not indicate anything about the source other than that it was one

which defendant claimed to be able to use again.

The Federal Rules of Evidence 28 U.S.C. 401. Rule 401 defines Relevance as:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The rule is cast in terms of probativeness. Does the offered evidence have a tendency to prove or disprove something significant in the case? In the case before this Court, the statement did not tend to prove, or disprove anything....it was not relevant and should not have been admitted.

This testimony is actually being admitted as an indirect way of presenting evidence to the jury of the defendant's character in an attempt, by confusing the issue, to prove that the defendants had a propensity to commit crimes of this sort and therefore were guilty of the crime for which they are charged.

Federal Rules of Evidence, 28 U.S.C. 404 prohibit the use of Character Evidence to show that the defendant acted out of propensity

> Rule 404 (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

The advisory Committee's notes state: Subdivision (b) deals with the specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another

purpose,.... the determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403, Slough and Knightly, Other Vices, Other Crimes,, 41 Iowa L. Rev. 325 (1956).

The jury should consider only whether the defendants actually committed the acts charged with the requisite mental state, and supposed future acts should not be allowed to cloud the issues.

The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged is inadmissable. Massei vs. United States,(1957, C.A. 1 Mass), 241 F.2d 895, affd. 355 U.S. 595 21 Ed,2d 517, 78 S.Ct. 495. Evidence of one crime is inadmissible to prove disposition to commit another crime. Drew vs. United States, (1964) 118 App D.C. 11, 331 F.2d 85.

By attempting to prejudice the jury and dissuade any doubt the jurors might have as to the existence of proof for any element of the offense with evidence intended to cast aspersions on appellants' character by suggesting they were habitual criminals, and therefore, must have committed this crime, the Government has unduly prejudiced the jury against these defendants.

The possibility that the admission of this testimony into evidence may have substantially influenced the jury in the verdict which they brought is grounds for reversal of the conviction under Federal Rules of Evidence.

Where the substance and the presentation of the evidence was clearly inadmissible and prejudicial, the cautionary instruction immediately following the testimony does not cure the error. United States vs. Nemeth (1970,C.A. 6 Ky) 430 F.2d 704.

In the case before the bar, there was no cautionary instruction to the jury that they were not to consider this statement as character evidence, which heightened the error. The statement was in regard to something that might occur in the future, an act for which the appellants are not now charged. In view of the highly prejudicial nature of the statement, it should have been excluded.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO IMMEDIATE CAUTION THE JURY THAT APPELLANT JOHNSON"S STATEMENT TO AGENT POCHOPIN COULD BE USED AGAINST JOHNSON ONLY.

Appellant MC CLAMB contends that the statement about future checks, attributed to appellant JOHNSON at the trial, testified to by the Secret Service Agent, should not have been admitted. The prosecution argued, during its offer of proof, for admission of Johnson's statement because such went to establish the motive of both defendants as well as their knowledge that the checks were in fact stolen. Although the Agent testified, at his appearance before the Grand Jury, that it was defendant MC CLAMB who referred to future checks for sale, the Agent was insistent, at trial, that it had been JOHNSON who made such a statement. Without proposing the argument that the statement was properly admitted, it is the appellant MC CLAMB's position that his counsel's opposition at the offer of proof for admission of such statement should have sufficed to have had the Court immediately instruct the jury to consider the statement of JOHNSON only insofar as JOHNSON was concerned and that such was not being attributed to defendant MC CLAMB. Without such an immediate instruction, the damage to MC CLAMB was so irreparable that such could not have been remedied by a specific request to charge which would have been given after summation by counsel. The only appropriate relief for appellant MC CLAMB, at this juncture, would appear to be a new trial.

POINT V

THE TRIAL COURT'S ERRONEOUS RULING THAT APPELLANT MC CLAMB'S TWO PRIOR CONVICTIONS COULD BE USED TO IMPEACH HIM PROHIBITED APPELLANT FROM TESTIFYING, THUS RENDERING NULL AND VOID HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION.

In the instant case, the Court should have barred the use of appellant MC CLAMB'S two prior convictions for two reasons: because 1) the likelihood of irreparable prejudice against appellant MC CLAMB as a probable result of such inquiry greatly outweighed its probative value in the instant case; and 2) because the particular facts and circumstances surrounding this case required that the appellant not be deterred from testifying in his own behalf, in order to assure a just disposition of the charges herein. Because the Court ruled that the two prior convictions, one a 1968 felony conviction for Robbery in the third degree and the other a 1972 misdemeanor conviction for Criminal Impersonation could be used to impeach appellant MC CLAMB, the appellant was virtually prohibited from testifying in his own defense for fear of evoking the antagonism of the jury.

Rule 609 of Title 28 U.S.C. Federal Rules of Evidence states as follows:

> Rule 609 (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime
>
> 1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or

2) involved dishonesty or false statement, regardless of punishment.

Appellant contends that under rule 609 and the case law which preceeded it, the trial court should have barred the use of his two convictions for impeachment purposes. Appellant has used the case law which preceeded the new Federal Rules of Evidence, since the rules are too recent for there to be substantial explanatory case law.

In regard to appellant MC CLAMB'S eight year old Robbery conviction and the conduct for which he was indicted and tried, there are both distinguishing factors and similarities to be drawn, and severe problems of undue risk of prejudice arose because of these aspects.

The New York Penal Law Section 160 defines Robbery as forcible stealing, and explains that the "immediate use of physical force upon another person" in the course of committing a larceny constitutes the gravamen of the offense. The 1954 New York decision of Thomas J. Atkins, etc. vs. Massachusetts Bonding and Insurance Co., 205 Misc. 476, 128 N.Y.S. 2d 784, states that the criterion which differentiates larceny from robbery is "the violence which preceded the taking and that such violence or intimidation must be contemporaneous with the taking of such property."

The essence of the crime with which the appellant was charged in the District Court was the unlawful possession of United States Treasury checks which had been stolen from the mail, knowing that such checks had been stolen; there was no allegation of theft or of any force or intimidation by the defendant upon another. The trial Judge's decision permitting cross-examination

of a remote conviction for an offense involving the elements of force and larceny endangered the appellant's opportunity for a fair trial under the "bad man" theory. The prejudicial affect of allowing cross-examination regarding this conviction would have been to convince the jury that a person who has been previously convicted of an offense involving both stealing and force is certainly guilty of possession of material stolen from the mail.

> A legitimate purpose of impeachment is not to show that the accused who takes the stand is a "bad person", but rather to show background facts which bear directly upon whether jurors ought to believe the defendant rather than other conflicting witnesses. Gordon vs. United States,383 F.2d 936

Where there is a close connection between the crime with which a defendant has been convicted and the crime with which the defendant is accused, the danger is that the admission of the previous conviction will convince the jury of the defendant's criminal propensity, and the jury is likely to prematurely label him a "habitual offender."

> Where multiple conviction of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did it this time." Gordon, supra.

The New York State Court of Appeals, citing the above language from Gordon, concluded that:

> ...cross-examination with respect to crimes or conduct similar to that of which defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility.
> People vs. Sandoval,34N.Y. 2d 371,357 N.Y.S.2d 849(1974).

In the instant case, the allowance of inquiry into appellant MC CLAMB'S Robbery in the Third Degree conviction would not have

placed his credibility in issue since robbery is an "assaultive" offense which is accomplished by direct confrontation with the person from whom goods are obtained. Allowing the use of this conviction for impeachment purposes served no purpose other than to stigmatize the defendant with the taint of one who must be guilty since he has from his past shown "criminal propensities." The Court's ruling dissuaded the appellant MC CLAMB from testifying in his own behalf, which in this case, precluded the possibility of all facts being brought to light and the assurance of a fair trial for appellant MC CLAMB.

The offense of Criminal Impersonation (Section 190.25, New York Penal Law), of which defendant was convicted in 1973, involves impersonation or acts done with pretended capacity. Such elements do affect the issue of credibility of a witness. It generally has been accepted that convictions for crimes involving deceit or breach of trust will have significant probative value, and evidence of which might be admitted to impeach a defendant witness, even if a higher risk of prejudice would be created thereby (Gordon, supra).

However, in United States vs. Luck, 121 U.S. App.D.C. 151, 348 F 2d 763 (1965) the Court held that:

> ...a trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand, and that such a decision was for the Court's sound judicial discretion. A trial judge may in certain cases believe that the cause of truth is helped more by allowing the jury to hear the defendant's foregoing testimony because of fear of prejudice founded upon a prior conviction.

The test of Luck, above, is a balancing test of whether the prejudicial effect of impeachment is outweighed by the probative relevance of the prior conviction to the issue of credibility.

According to the Luck-Gordon line of cases, the trial Court is not required to allow impeachment by a prior conviction every time a defendant takes the stand in his own defense, even where credibility may be at issue "where it is deemed more important to the search for the truth in a particular case, for the jury to hear the defendant's story than to know of a prior conviction." (Luck, infra).

Rule 609 of the Federal Rules of Evidence hereinafter 28 U.S.C., 609 appears to permit impeachment by evidence of conviction of a crime during cross-examination under two circumstances. When Rule 609 is interpreted in a most gramatically literal manner, these circumstances are (1) where the crime is punishable by death or imprisonment in excess of one year AND the balancing test articulated in Luck, upholding the greater weight of a conviction's probative value against its possible prejudicial effect (Rule 609 (a) 1), or (2) where the prior conviction involved dishonesty or false statement, regardless of the punishment (Rule 609 (a)2).

It is ambiguous from the face of the statute whether Rule 609 (a) (2) is differentiated from Rule 609 (a) (1) upon the basis of punishment only, or whether a 609 (a) (2) defendant is per se denied the benefit of the (a) (1) balancing test.

Since there exists only one forum for the disposition of Federal offenses, in which the 28 U.S.C. Rules of Evidence are binding, Rule 609 cannot be applied in a manner which would place an entire genre (609(a)(2)) of criminal defendants prosecuted in Federal Courts on a different footing from other defendants (609(a)(1)) tried in the Federal system who would be charged under the same United States Code Provisions. To do so would

constitute treatment of similarly situated persons in different fashions and would seriously violate the equal protection clause of the Fourteenth Amendment.

A reading of Rule 609 (a)(2) which precludes such defendants from utilizing the balancing test would narrow the entire Luck-Gordon line of cases, and fetter the use of judicial discretion. Although the Rule is new, and caselaw scarce which even peripherally addresses this problem, the 1975 case of United States vs. Belt, 514 F.2d 837,tends to refute such a restrictive reading of 609 (a)(2) by the statement of that Court:

> "The Luck-Gordon cases establish the principle that a trial court may use its own discretion whether to allow or exclude such evidence of prior convictions...Statutes giving an absolute right to the prosecution to question the defendant as to previous convictions are out of line.

In the case before this, the prior conviction for criminal impersonation falls within the ambit of Rule 609 (a)(2). As a result of the circumstances of this case, it was imperative that the defendant MC CLAMB testify, but he could not do so if his presence as a witness would only have further damaged his defense through cross-examination concerning prior convictions.

In the case of United States vs. Palumbo, 401 F.2d 270 (2nd Circuit, 1968) cert. denied 394 U.S. 947 (1969) the Court held that a trial judge does have power, in the exercise of sound discretion, to make an advance ruling prohibiting the use of a prior conviction for impeachment of a defendant "if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors

improperly." Palumbo, supra at 273, cited in United States vs. Puco, 453 F2d at 541.

It is stated in United States vs. Puco, 453 F.2d 539, that: "Reference to a defendant's criminal record is always highly prejudicial. The average jury is unable, despite curative instructions, to limit the influence of the defendant's criminal record to the issue of credibility."

In People vs. Gornick, 448 F2d 566 (1971), where the trial Court denied the defendant's motion to suppress evidence of his prior record, the Court did so because "...nothing in the record suggested even the possibility of the defendant testifying on his own behalf at trial, and the trial Court was not advised that the defendant would contribute to his own defense."

In the instant case, the appellant indicated his intention to contribute to his defense but was in fact stripped of his defense completely because he could not testify for fear of evoking the antagonism of the jury.

For the above mentioned reasons and circumstances, the prejudicial effect of the trial Court's ruling that evidence of prior convictions could be used to impeach appellant so far outweighed any probative worth of such evidence on the issue of credibility that the ruling was clearly erroneous.

CONCLUSION

WHEREFORE, for the reasons hereinbefore stated, the appellants respectfully request that their convictions be reversed without possibility of retrial for failure in the government's proof; in the alternative, that their convictions be reversed and a new trial ordered, or for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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In the District Court of the United States

For the Western District of New York

CR 75-244

THE UNITED STATES OF AMERICA

-vs-

LEONARD JOHNSON AND LEROY MC CLAMB

MARCH 1975 SESSION ~~Term~~
(Convened 5/27/75

No.

Vio. T. 18, U.S.C., §§1708 and 2

COUNT I

The Grand Jury Charges:

On or about the 7th day of October, 1975, in the Western District of New York, the defendants, LEONARD JOHNSON and LEROY MC CLAMB, unlawfully had in their possession the following United States Treasury checks, all of which were dated October 1, 1975, as follows:

	NO.	AMOUNT	PAYABLE TO
1.	53,757,542	$218.55	Marie Jennings
2.	53,756,987	28.85	Lottie Fowler
3.	80,048,011	601.15	Dock Daniels
4.	28,655,595	50.40	Marie McElrath
5.	7,010,547	116.75	Lemon F. Houston
6.	31,573,003	65.00	S. G. Pendleton
7.	31,573,010	47.25	Thelma M. Anderson
8.	53,757,621	64.15	Lula B. Daniels
9.	53,757,140	112.95	Susie B. Hooker
10.	53,757,190	64.45	Vane Saunders

	NO.	AMOUNT	PAYABLE TO
11.	7,010,492	$114.38	Virginia E. Carothers
12.	53,756.885	44.20	Ruth Miller
13.	53,576,713	50.95	Josephine Ferguson
14.	7,112.922	109.65	Idella Pope
15.	53,757,472	5.25	Lola Woollard
16.	53,756,982	87.98	Frances Baynard
17.	53,757,318	57.38	Carrie Dobson
18.	53,756,773	86.15	Emmie Tucker
19.	29,142.794	35.00	Andrew Griffith
20.	28,168,022	129.56	Norwood Jenkins
21.	53,757,699	53.78	John Moore

Which checks had been stolen from the mail, well knowing the said checks had been stolen; all in violation of Title 18, United States Code, Sections 1708 and 2.

Richard J. Arcara

RICHARD J. ARCARA
United States Attorney

A TRUE BILL:

Earl A. Powers

FOREMAN

Form DJ-195
(Ed. 2-7-66)

No. _____

UNITED STATES DISTRICT ~~MXSTRRN~~ COURT

WESTERN *District of* NEW YORK

_____ ~~X*Division*~~

THE UNITED STATES OF AMERICA

vs.

LEONARD JOHNSON AND LEROY MC CLAMB

INDICTMENT

A true bill,

_____

Foreman.

Filed in open court this 22 *day of* October, *A. D. 19*25

_____

Clerk.

*Bail, $*_____

GPO 902-482

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

UNITED STATES OF AMERICA,
Plaintiff,

- against - RULE ON APPEAL

LEONARD JOHNSON,
LEROY McCLAMB,
Defendants.

* *

1. Indictment
2. Notice of Motion, Defendant's Joint Motion for Pre-Trial Discovery
3. Government's Response to Pre-Trial Motions
4. Government's Supplemental Discovery & Inspec
5. Government Response to Pre-Trial Motions
6. Notice of Motion for Defendant McClamb (Mendoval)
7. Court's Memorandum and Order, 26 March 1976, as to McClamb Motion for Sandoval
8. Defendant McClarb's Motion for Acquittal, etc.
9. Defendant Johnson's Motion for Acquittal, etc.
10. Letter of 7 October 1976 from prosecution relative to defendant's requests for acquittal.
11. Court's Memorandum and Order, 20 October, 1976, as to defendant's Motions for Acquittal
12. Defendant's subpoena to "Secret Service Agency"
13. Transcript of 1 November, 1976, sentence, defendant McClamb
14. Judgment and Probation/Commitment Order, defendant McClamb
15. Notice of Appeal, defendant McClamb
16. Transcript of 2 November, 1976, sentence, defendant Johnson
17. Judgment and Probation/Commitment Order, defendant Johnson
18. Notice of Appeal, defendant Johnson
19. docket sheet reflecting Court appearances (23 pages)
20. Government's Notice of Motion, requesting adjournment, dated 26 March, 1976.
21. Defendant's Joint Requests to Charge
22. Government's Requests to Charge

23. Supplemental Government Requests to Charge

24. Trial Record (two volumes).

Yours, etc.,

BARBARA [illegible]
Attorney for Defendant McClamb
Office & P.O. Address
318 Brisbane Building
Buffalo, New York 14203

JAMES McFEE
Attorney for Defendant Johnson
Office & P.O. Address
1340 Statler Hilton Hotel
Buffalo, New York 14202

Dated: Buffalo, New York
1 December, 1971

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff,

-vs.-

LEONARD JOHNSON and
LEROY McCLAMB,

Defendants.

Cr. 75-244

MEMORANDUM

and

ORDER

Defendant Leroy McClamb was indicted along with his co-defendant, Leonard Johnson, under 18 U.S.C. §§1702 and 1708 after allegedly stolen United States Treasury checks were found in their possession. The Government has indicated its intention to use two prior convictions of McClamb for impeachment purposes if he should take the witness stand. The first conviction was on April 29, 1968 for Robbery in the Third Degree which under Section 2128 of New York's Penal Law of 1909, then in effect, was punishable by a maximum term of imprisonment of ten years. The second conviction was on February 14, 1974 for Criminal Impersonation which under Section 190.25 of New York's Penal Law is a Class A misdemeanor punishable by a maximum term of imprisonment of one year. Defendant McClamb has moved for a pre-trial ruling barring such utilization of these convictions.

Giving due consideration to the affidavit and memorandum submitted in support of this motion, I nevertheless deny the motion of defendant Leroy McClamb to suppress the use of the 1968 and 1974 convictions. See United States v. Puco, 453 F.2d 539 (2d Cir., 1971), and United States v. DeAngelis, 490 F.2d 1004 (2d Cir., 1974), cert. denied 416 U.S. 956 (1974).

The 1968 conviction is admissible under Rule 609(a)(1) of the Federal Rules of Evidence inasmuch as I find that probity re McClamb's credibility would outweigh prejudice to him -- only slightly, admittedly. The 1974 conviction is admissible under Rule 609(a)(2) which neither requires nor allows such weighing inasmuch as it involved dishonesty or false statement.

So ordered.

Dated: Buffalo, N.Y.
March 26, 1976

s/ John T. Elfvin
U.S.D.J.

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:20 P.M.

(Defendants present, counsel present, jury present.)

CHARGE OF THE COURT

THE COURT: Now, ladies and gentlemen, it is my responsibility to give to you the principles of law which will govern your deliberations and your determination in the case, and I recite what the attorneys have told you, and I have told you before, that of course it is your primary duty to determine the facts, and you are the only ones that are going to determine the facts, and I don't know if I am going to make any reference to any facts, the attorneys have, but if I do it is merely for the purpose of helping you to understand some of the principles of law that I am going to give to you.

In any event, as I said, anything the attorneys said in their arguments or at any other point in the trial or anything that I may say concerning the facts which conflict at all with anything that you remember the facts to be and the manner in which you remember them,

you take your own recollection as being the controlling factor.

The indictment has been read to you both by Mr. Wagner and Mr. McLeod, and I also will briefly refer to it. It will come to you in the jury room as Court Exhibit A, and you will see therein that there is a listing of twenty one separate checks and amounts and payees, which you will have before you. The rest of it is quite simple and direct, and it says that on or about the 7th day of October 1975, in the Western District of New York -- the Western District of New York being those seventeen counties that are in this end of New York State, including Erie County, the defendants, Leonard Johnson and Leroy McClamb, unlawfully had in their possession the following United States Treasury checks, all of which were dated October 1, 1975, as follows -- then we have the listing -- which checks had been stolen from the mail, well knowing the said checks had been stolen; all in violation of Title 18, United States Code, Section 1708 and Section 2. I told you before and again I tell you that, of course, the indictment itself means nothing, it

is not any kind of evidence. It is merely a piece of paper, a formal method by which we bring the case into court, and we tell the defendants what crime they are charged with. It is not evidence of any kind against them.

Now, I mentioned Section 1708 -- or rather the indictment refers to that section, and the pertinent portion of that is as follows: "Whoever unlawfully has in his possession any letter, package, bag or mail or any article or thing contained therein which has been stolen, taken or abstracted from or out of any mail letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, knowing the same to have been stolen, taken or abstracted is guilty of an offense against the laws of the United States."

I talked initially, and the attorneys have talked, of elements of a crime, and I tell you that there are three essential elements that the Government has the burden of proving beyond a reasonable doubt -- that is a phrase that I will use often, and I will ultimately define it for you -- three essential elements must be so

shown before the offense charged in the indictment can be deemed to have been established, and the first one of these is that the defendants, Leonard Johnson and Leroy McClamb -- and I put that together jointly, but I will tell you further as the attorneys have told you, that you will be weighing the guilt or innocence of each of those defendants separately -- the defendants, Leonard Johnson and Leroy McClamb, unlawfully possessed the Treasury checks described in the indictment. The second element is that the checks were actually stolen from the United States mail. There is no allegation that Mr. Johnson or Mr. McClamb stole them, but you must find as one of the elements that the checks in fact had been stolen from the mail. Third, that the defendants again I use the plural, you will be weighing it as to each one -- knew the checks had been stolen, not from the mail, but had been stolen, and you will note that there is no requirement on the Government to prove that the defendants or a particular defendant knew that the Treasury checks had been stolen from the mail, but only that they knew they had been stolen. Again, the burden is always on the Government, the

prosecution, to prove beyond a reasonable doubt each of those essential elements, and the law never imposes upon either defendant in this or any other criminal case the burden or duty of calling any witness or producing any evidence.

The statute and the indictment and the elements talks of possession. In the law in this type of case for this purpose there are two kinds of possession; actual possession and constructive possession, and a person who knowingly has direct physical control over a thing at any given time is said to be in actual possession of it. A person who, not in actual possession, knowingly has both the power and the intention at that given time to exercise dominion and control over a thing, either directly or through another person, is said to be in constructive possession of it, and the law also recognizes that possession can be sole or joint, and if one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share the actual or constructive possession of the thing, then possession is joint. You may find that the element of possession, as that

term is used in these instructions, is present if you find beyond a reasonable doubt that a defendant, one whose guilt or innocence you are considering, had actual or constructive possession, either alone or jointly with another or others.

Now, an act or failure to act is knowingly done, and I have used that term, if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

I have also used the term "unlawfully" and that means contrary to law. So to do a thing unlawfully means to do willfully something that is contrary to law.

Stolen has the usual connotation, the usual meaning, it means acquired or possessed as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another without or beyond any permission that is given, and with the intent to deprive the owner of the benefits of his ownership.

I have used the term "willfully" and that means that an act is done voluntarily and intentionally, with the specific intent to do

something that the law forbids, namely, with a bad purpose either to disobey or disregard the law.

Stolen from the mail, that expanded phrase means acquired or possessed as a result of willfully taking or obtaining any letter or other mail matter from or out of any mail post office, letter box, mail receptacle, mail route or other authorized depository for mail matter, or from a letter or mail carrier, or willfully removing from a letter or other mail matter any article or thing contained therein.

Now, actual knowledge that the Treasury checks were stolen or unlawfully taken is an essential element of the offense. The Government is required to prove that the defendant, whose guilt or innocence you are determining, knew that the Treasury checks were stolen, but not necessarily that he knew the checks were stolen from the mail. You may not find such defendant guilty unless you find beyond a reasonable doubt that he knew that the Treasury checks had been stolen. It is not sufficient to show that he may have suspected or thought that the checks were stolen. The fact of knowledge,

however, may be established by direct or circumstantial evidence, which I will tell you more about later, just as any other fact in the case can be determined by you.

Now, in weighing the evidence which you have before you in this trial, you can consider the cirsumstances, if you find it is established beyond a reasonable doubt, that a defendant had possession of the Treasury checks recently after they were stolen from the mail, as is alleged in the indictment. Possession of recentl stolen property, if not satisfactorily explained by other evidence, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by all of the evidence, that a defendant who had possession of the checks knew that they had been stolen. However, you are not required to make this inference, and you alone are to determine whether the facts and circumstances shown by the evidence warrants any inference which the law permits you to dra from the possession of recently stolen property. The possession of recently stolen property by a defendant does not shift the burden of proof.

The burden is always on the Government to prove beyond a reasonable doubt every essential element of an offense as to each defendant.

The term "recently", as I have used it, is a relative term, it has no fixed meaning. Whether property may be considered as recently stolen property depends upon the nature of the property and all of the facts and circumstances shown in the evidence in the case. The longer the period of time since the Treasury checks were stolen, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. If you should find beyond a reasonable doubt from the evidence in the case that the Treasury checks described in the indictment were stolen from the mail, and that they were in the actual or constructive possession of the defendant, whose guilt you are determining, recently after they were stolen, you may from those facts draw the inference that the checks were possessed by that defendant with knowledge that they were stolen, unless such possession is explained to your satisfaction by other evidence in the case and by logical inferences therefrom.

Now, in considering whether a defendant's possession of recently stolen property has been satisfactorily explained, you must bear in mind that a defendant is not required to take the witness stand or furnish any explanation. Possession may be satisfactorily explained through other circumstances, other evidence and inferences therefrom, independent of any testimony of the defendant or any evidence adduced by a defendant. I emphasize again that the law never imposes upon a defendant in a criminal case the burden or duty of being a witness, calling any witnesses or producing any other evidence. Even though a defendant's possession of recently stolen property is unexplained or is not satisfactorily explained, you cannot draw the inference under consideration if on the evidence as a whole you have a reasonable doubt as to his guilt. As I have said earlier, the Government must prove beyond a reasonable doubt that the defendant, whose guilt or innocence you are weighing, had actual knowledge that the Treasury checks were stolen. An inference of the existence of this knowledge may be drawn from evidence that such defendant

was aware of a high probability that the checks were stolen, unless you find that he actually believed that the checks were not stolen. The element of knowledge may be satisfied by inferences drawn from proof that he deliberately and intentionally closed his eyes to facts which would have otherwise been obvious to him. If you find from all the evidence beyond a reasonable doubt that he had a conscious purpose to avoid learning the source of the Treasury checks, you may infer that he knew that the Treasury checks were stolen. I emphasize, however, that this requisite knowledge cannot be established by demonstrating merely negligence or even foolishness on his part.

Now, we have multiple defendants in the case, there are two defendants, and I have indicated already that you will separately weigh and determine the evidence as to the crime charged in the indictment, and you will determine the guilt or innocence of Mr. Johnson and of Mr. McClamb separately. However, in a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personall

did every act constituting the offense charged. You will remember that as I read the indictment there is a reference to another section of the Criminal Code, namely Section 2, and that reads: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense.

Participation is willful if it is done voluntarily and intentionally, and with a specific intent to do something that the law forbids, that is to say, with a bad purpose, either to disobey or disregard the law. In order to aid and abet another to commit a crime, it is necessary that a defendant willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wants to bring about, that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

You, of course, may not find a defendant

guilty unless you find beyond a reasonable doubt that every element of the offense, as defined in these instructions, was committed by some person or persons, and that the defendant, namely, the defendant whose guilt or innocence you are considering, participated in its commission. Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant aided and abetted the crime, unless you find it beyond a reasonable doubt that such defendant was a participant and not merely a knowing spectator.

Each defendant is entitled to have his guilt or innocence as to the offense charged determined from his own conduct and from the evidence which applies to him, as if he were being tried alone. The guilt or innocence of one defendant of the crime charged should not influence your verdict respecting the other defendant except, of course, as I have mentioned, you may not convict a defendant of aiding or abetting a crime unless you find that someone, the other defendant or someone, committed the crime. You may find any one or both of the defendants guilty or not

guilty but, nevertheless, you must relate the evidence only as to the defendant toward whom it is received and, in any event, as I say again, you must determine the guilt of each defendant by giving separate consideration to the evidence which applies to him.

I mentioned that you are the sole judges of the facts, and in that connection you must determine which of the witnesses you believe, and what portion of their testimony you accept, and what weight you attach to it.

At times during the trial I sustained objections to questions which were asked without permitting the witness to answer, and I tell you that you may not draw any inference from an unanswered question. The law requires your decision to be made solely upon the competent evidence before you, and any such items that I have excluded from your consideration are not legally admissible and must not be considered.

You are also the sole judges of the weight that you are going to assign or give to the testimony of the different witnesses. Some of the evidence in the case may to you be more believable, more credible than other evidence,

and the matter of the credibility of the witnesses you have heard is one of the questions of fact which you must take into consideration in arriving at your verdict, and you are entitled to and you should utilize in this connection your observation of the witnesses as they appeared before you, and your own experience in your respective lives in deciding when somebody is telling the truth. You may find that one witness was a better observer, had a more accurate memory or was otherwise more reliable than other witnesses. You may take into consideration in evaluating the testimony the demeanor of the witness on the stand, and the interest or lack of interest which he has in the outcome of the litigation. If you find that a witness testified falsely concerning any material matter, you have a right to discount his entire testimony or you can take from the testimony that which you believe and disregard or discard that which you find to be not true. A witness knowingly testifies falsely if he testifies intentionally and not because of mistake or other innocent reason.

There are certain rules of law, some of which I have already mentioned, which are common

to all criminal cases, and which you must apply in reviewing the evidence. A basic rule in all criminal cases is that the defendant is presumed to be innocent, and that presumption of innocence remains with each defendant throughout the trial, and it continues to exist until such time as each of you is convinced beyond a reasonable doubt by legal and competent evidence that the defendant is guilty of the offense charged.

The burden of proof that person is guilty beyond a reasonable doubt rests with the Government at all times, it never shifts to a defendant. In order to sustain its burden, the Government must present proof which is sufficiently strong to convince each of you of each defendant's guilt beyond a reasonable doubt. The requirement that the prosecution prove a defendant's guilt beyond a reasonable doubt extends to every essential element of the crime charged, as I have enumerated them. However, in determining whether the guilt of a defendant has been established beyond a reasonable doubt, you are not limited to the proof from the Government's witnesses because you have the documentary evidence before you also. In other words, you

are not limited to what came from the lips of the witnesses, you review all of the evidence in the case, both the Government's and what the defendants have been able to bring out by their cross examination, and what you find in the documents before you. If you are satisfied from a review of all of that evidence that the evidence establishes guilt beyond a reasonable doubt, you may convict the defendant. On the other hand, if you have a reasonable doubt at any point with respect to guilt, you must acquit the defendant, you must declare him not guilty. Again, you separately weigh and determine the guilt or innocence of each defendant as to the crime which is charged.

I mentioned reasonable doubt and I promised to define it for you. A reasonable doubt is a fair doubt, which is based upon reason and common sense, and which arises from the state of the evidence. Of course, it is rarely possible to prove anything to an absolute certainty. So proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely upon or act upon in the most important of your own affairs. A defendant is not to be

convicted on mere suspicion or mere conjecture. A reasonable doubt may arise not only from the evidence which has been produced in the case, but also from a lack of evidence. Because the burden is upon the prosecution, to prove each defendant's guilt beyond a reasonable doubt of every essential element of the crime, each defendant has the right to rely upon the failure of the prosecution to establish such proof. The defendant may also rely upon evidence brought out on cross examination of the witnesses which the prosecution has produced. Again, and I reiterate, that the law does not impose upon a defendant the duty of producing any evidence. Now, remember that a reasonable doubt is such a doubt as is based upon reason and as appeals to your power of logic. It is a doubt which arises out of something tangible in the case or something lacking in the case. It is to be distinguished from a doubt which might be based upon some emotion, such as a whim or fancy or a feeling. If you feel uncertain and not fully convinced that a defendant is guilty of the crime charged, and you believe that you are acting in a reasonable manner, and you believe

a reasonable man or woman in any matter of like importance would hesitate to convict because of such a doubt as you have, that is a reasonable doubt, to the benefit of which a defendant is entitled. If you have such a doubt, you must acquit. As I stated before, a reasonable doubt in your mind as to any essential element of the crime entitles the defendant to acquittal of the crime and entitles him to be judged not guilty. However, the rule that the Government must prove every essential element of the crime beyond a reasonable doubt does not mean that you must believe the testimony of every Government witness as being true beyond a reasonable doubt or that every piece of evidence that has been offered is true beyond a reasonable doubt. It only means that the credible evidence as weighed and found by you, under these instructions, and viewed as a whole, must establish every essential element of the crime and each defendant's guilt beyond a reasonable doubt.

I mentioned that there are two types of evidence, direct and circumstantial, upon which you can rely to find a defendant guilty of an offense or in weighing the guilt or innocence

of a defendant as to an offense. Proof may consist of the testimony of those who witnessed the defendant's conduct and who testified to that conduct in the course of the trial. This is called direct evidence or eyewitness evidence. Although the Government may not be able to produce eyewitnesses to the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. You are entitled to draw from one fact the existence of another, if reason and experience support the inference, that is to say, you may draw from facts which you find to have been proven such reasonable inference or inferences as seem justified in reason and logic in light of your own experience in life.

Now, proof of a chain of circumstances pointing to the commission of an offense by a defendant is termed circumstantial evidence. For example, if you go to bed of an evening and there is no snow on the ground, and you wake up the next morning and there is a blanket of snow, you have no direct knowledge or evidence that the snow fell, but you certainly have circumstantial evidence that the snow fell during the

night. You may, of course, consider and find that both types of evidence, both direct and circumstantial, bearing upon the innocence or guilt of a defendant are present in the case, and you can consider both types. The law makes no distinction between direct and circumstantial evidence, but it simply requires that before you convict a defendant you be satisfied of his guilt beyond a reasonable doubt.

I mentioned inferences, and you may rely on proper inferences, and basically an inference is nothing more than a deduction or a conclusion which reason and common sense lead you to draw from facts which have been proven. Any inference which you draw from the evidence must reasonably flow from and be based upon facts established by the evidence, and because a permissible inference in law must flow naturally and logically from and be based upon facts established by the evidence, it follows that you may not base further inferences upon inferences already drawn. One inference may not be based upon or drawn from another inference, it must be based upon the evidence. If in the course of your consideration of all of the evidence as to a

defendant, you find certain evidence admits equally of two inferences, one supporting innocence and the other supporting guilt, you must accept the inference supporting innocence and reject the inference supporting guilt.

Now, intent is the purpose or aim or state of mind with which a person acts or fails to act. Ordinarily we very properly infer that a person intends the natural and probable consequences of acts done or knowingly admitted to be done, and so in the absence of evidence in the case which leads you to a different or contrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by such person. Now, an act or failure to act is knowingly done if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. Again, intent may be proved by indirect or circumstantial evidence and, as Mr. Wagner pointed out, you cannot take the top of one's head off and

look inside and see what is in there in the way of intent, you must depend upon indirect or circumstantial evidence, and while witnesses may see and hear and be able to give direct evidence of what a person does or fails to do, there cannot be any eyewitness account of the state of mind with which acts are done or not done. What a person does or fails to do can indicate to you either intent or lack of intent to act or fail to act. Unless otherwise instructe in determining any issue involving intent, you may consider the facts and circumstances in evidence in the case which aid you in your determination of the state of mind.

You are instructed as a matter of law that you are not to be influenced by the fact that the Government of the United States is a party to this action -- the Government is the prosecutor, the Government agents have testified -- for I charge you that the Government is to be considered the same as any other party, and that its attorney is to be considered as any other lawyer would be considered and that the Government agents are to be considered the same as any other witness.

It is your duty merely to determine the guilt or innocence of each defendant. You are not to concern yourselves with any punishment that a defendant may receive if convicted. That is a matter with which I would be concerned if a defendant should be convicted by you of the crime charged.

I have told you that a defendant in our courts has no obligation to give any evidence, and I tell you that you are not to draw any inference from the failure of the defendant in this case to take the stand. A defendant has the right to go to you, the jury, on the contention that the evidence of the prosecution is insufficient to warrant his conviction under these rules of law.

Now, there will be two verdicts on the single count, you will have a verdict of guilty or not guilty for each defendant on the charge in the indictment. These verdicts have to be reached unanimously, with all twelve of you agreeing on the result. You can find one or both of the defendants guilty as charged, or one or both not guilty, or one guilty and the other not guilty. It is your duty to give separate

personal consideration to the case of each defendant, and when you do so, you should analyze what the evidence in the case shows with respect to that individual. Each defendant is entitled to have his case determined from the evidence as to his own acts and conduct and any other evidence in the case which may be applicable to him.

I mentioned that I am sending a copy of the indictment to the jury room for your reference, that has been marked Court Exhibit A. I emphasize again that the indictment is not evidence, it is merely the device we use to tell the defendant what the charges are, and you are not to consider it as proving or tending to prove anything whatsoever.

Now, finally, I remind you of the oath each of you took as you were sworn as jurors and promised that you would well and truly try the issues in this case and a true verdict give herein according to the evidence, so help you God. I suggest to you or remind you that if you follow that oath and you try the issues without combining your thinking with any emotions, that you will arrive at a true and just verdict.

It must be clear to you that if you get into an emotional state, and if you let bias or sympathy or prejudice interfere with your thinking, you won't arrive at a true and just verdict. As you deliberate, ladies and gentlemen, please be careful to pay attention to the views and listen to the opinions of the other jurors, and ask for an opportunity to express your own views. No single juror holds center stage in the jury room, and no juror monopolizes the deliberations. If after you listen to the other jurors, and if after stating your own view, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view. On the other hand, do not surrender your honest convictions just because you are outnumbered. As I have said, your verdict must be unanimous. Each verdict must represent the absolute convicti of each one of you. As you retire to go to the jury room, as the first order of business you should select one of your number to speak for you when you come back to the courtroom or otherwise get in touch with me. Any communication that you have from the jury room would be

by a note that you hand to the deputy marshal who will be on duty outside the room, and the marshal will see that it gets to me. Don't ask the deputy marshal any questions about your duties. If you have any such questions, send me a note. Also by a note you can request a clarification of these instructions or a reading of my instructions, or all or part of the testimony of any witness. Also use a note to tell me when you have reached your verdict or, in appropriate circumstances, when you find yourselves so deadlocked that unanimity is impossible. Never tell me or anyone else how your voting stands at any time, except to say in open court that a verdict or verdicts has been reached unanimously.

Now, Miss Handschu and gentlemen, do you have any requests or exceptions and, if you do, do you want to be heard on those outside the presence of the jury?

MR. WAGNER: I have none, your Honor.

MISS HANDSCHU: None.

MR. MC LEOD: None, your Honor.

THE COURT: All right, thank you. Swear the deputy marshals.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-vs.-

LEONARD JOHNSON and
LEROY McCLAMB.

Cr. 75-244

MEMORANDUM

and

ORDER

Defendants Leonard Johnson and LeRoy McClamb were convicted by a jury of unlawful possession of stolen mail, specifically certain Treasury checks, in violation of 18 U.S.C. §§1708 and 2. Both defendants now move for judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure or, in the alternative, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure or, in the further alternative, for the arrest of judgment pursuant to Rule 34 of the Federal Rules of Criminal Procedure.

Both defendants contend that the Government failed to meet its burden of proof in that insufficient evidence was introduced to prove that the checks in question had been stolen from the mail. An essential element of the offense charged in the indictment was that checks had actually been stolen from the United States mails. Sufficient evidence was adduced at trial from which the jury could have drawn an inference justified by reason and logic that the checks in question had indeed been stolen from the mail. Because the

evidence could have led a reasonable mind to conclude guilt beyond a reasonable doubt, defendants' motion for judgment of acquittal must be denied. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

Defendants also contend that acquittal is justified because the Government failed to establish that the items stolen from the mails were valid Treasury checks. Whether such Treasury checks were valid or not is irrelevant to a conviction for possession of stolen mail under 18 U.S.C. §1708. The Government had to prove only that the checks in question were stolen from the mails, not that they were valid Treasury checks.

A motion for the arrest of judgment may only be based upon failure of an indictment to charge an offense or the court's lack of jurisdiction of the offense charged. United States v. Zisblatt, 172 F.2d 740 (2d Cir. 1949). Defendants' contention that this Court lacks jurisdiction is frivolous. This Court's jurisdiction does not depend on proof that the items in question were valid Treasury checks.

Defendant McClamb contends that an admission of defendant Johnson that he could get additional checks at a future date was improperly admitted into evidence or, in the alternative, that the jury should have been immediately instructed that Johnson's statement was to be considered with respect to him and not McClamb. This admission made in the presence of

McClamb was properly admitted as to both defendants because it was relevant to show that they both had knowledge that the checks were stolen. In addition, it was relevant as to both defendants to establish intent to possess stolen mail unlawfully and to show that they ware not under duress or entrapped.

It is therefore hereby

ORDERED that defendants' motions are denied.

Dated: Buffalo, N.Y.
October 28, 1976

/s/ John T. Curtin
U.S.D.J.